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Re ONG LAI, DECD.; ONG THIAN EE & ORS. v. TAN TIAN TEE & ORS.

[O. C. J. (Evans J.) November 3, 1947]

[Ipoh — Originating Summons No. 190 of 1947]

Will and Trust — Construction — Vested or Contingent Interest — Trust for accumulation of income — Whether there is power to pay maintenance.

In this Summons the plaintiffs asked for the determination of certain questions arising on the construction of the Will of Ong Lai (deceased). The material parts of the Will are as follows:—

"2. . . . and I direct that the income of the unsold part thereof (the real and personal property) for the time being shall be applied as if it were income of investments of the proceeds of sale and calling in thereof.

4. I hereby further declare that no beneficiary to my estate shall be entitled to draw any allowance thereout as every such beneficiary has a private source of income.

5. I hereby further declare that the trustees shall have absolute power to give to any charitable purpose any sum of money as they may think fit.

8. I further hereby declare that my trustees shall on the youngest of my following children namely: (a) Ong Cheow Beng; (b) Ong Kuai Ee; (c) Ong Joo Ee; (d) Ong Soo Ee; (e) Ong Thian Ee; (f) Ong Chu Ee; (g) Ong Teck Ee; (h) Ong Kim Hong; (i) Ong Kim Lan (*f*); (j) Ong Kim Chian (*f*); (k) Ong Kim Cheok (*f*); and (l) Ong Kim Mooi (*f*) attaining the age of twenty-one years divide my residuary estate into so many equal shares as may be required and finally distribute them among my said wife and my said children in manner following:

(i) three shares to my wife. Provided that in case my said wife shall die before the date of final distribution of my residuary estate her said shares shall go to my said children in equal shares in the same manner as given below;

(ii) one share to each of my said children as shall survive the date of the final distribution of my residuary estate. Provided nevertheless that in case any one of my said sons or daughters shall die before the date of such distribution leaving a lawful spouse and/or issue which expression shall include adopted children living at the date of such distribution such spouse and/or such issue shall stand in the place of such deceased son or daughter and take equally between them if more than one the share of my estate which such deceased son or daughter would have taken if he or she had survived the date of such distribution."

Held: (1) clause 5 of the Will does not create any charitable trust and fails for uncertainty; (2) the gift of the residuary estate to the children in clause 8 is not a vested but a contingent gift as the shares do not vest until the youngest child attains 21 years; (3) clause 4 of the Will implies that the intermediate income from the trust fund must be accumulated by the trustees; (4) the residuary gift to the widow under clause 8 of the Will is a vested gift subject to a gift over, but because of clause 4 the widow is not entitled to intermediate payment of income; (5) the trustees have no power to apply the income of the trust fund to the maintenance of the infants.

Cases referred to:—

(1) *In re Lodwig* (1916) 2 Ch. D. 26.
(2) *In re Gan Eng Seng* 9 S.S.L.R. 72.
(3) *Wharton v. Masterman* (1895) A.C. 186.
(4) *Festing v. Allen* 12 M. & W. 279.
(5) *Cunliffe v. Brancker* 3 Ch. D. 399.
(6) *Leeming v. Sherratt* 2 Hare 14.
(7) *Parker v. Sowerby* 1 Drew 488.
(8) *Lloyd v. Lloyd* 3 K. & J. 20.
(9) *Coldicott v. Best* 2 Hare 14.
(10) *In re Astor* 90 L.J. Ch. 499.
(11) *In re Francis* (1905) 2 Ch. 295.
(12) *In re Turney* (1899) 2 Ch. D. 739.
(13) *In re Reade-Revell, Crellin v. Melling* (1930) 1 Ch. 52.

Cur. Adv. Vult.

ORIGINATING SUMMONS.

S. K. Das for the plaintiffs.

H. T. Ong for the defendants.

Chin Swee On for the Asst. Registrar, who was appointed by the Court to represent the class of persons to whom the gift over has been made under Clause 8(i) and (ii) and who are interested in contending that the residuary estate did not vest as on the death of the Testator in the residuary legatee.

Evans J. : — The plaintiffs on this Summons are five of the beneficiaries under the Will of one Ong Lai, and they took out this Summons for the determination of certain questions arising on the construction of the Will of the deceased. The first defendants are the executors under the Will and other beneficiaries. The second defendants are the persons to whom any gift over has been made under clauses 8(i) and (ii).

The Testator died on the 25th November, 1940, leaving a Will made by him on the 21st September,

1940. He appointed the first defendants, who are his widow and 6th son, Executors and Trustees of that Will and guardians of his infant children. He then went on to devise and bequeath all his property to the Trustees with instructions to sell and call in the same with power to postpone such sale. The Testator then went on to give further directions and to declare certain trusts. The Will does not appear to have been drawn up by a lawyer and the dispositions are not clear and exhaustive.

The provisions of the Will upon which questions of construction arise, and answers to which are sought by the Summons, are as follows:—

2. . . . and I direct that the income of the unsold part thereof (the real and personal property) for the time being shall be applied as if it were income of investments of the proceeds of sale and calling in thereof.

4. I hereby further declare that no beneficiary to my estate shall be entitled to draw any allowance thereout as every such beneficiary has a private source of income.

5. I hereby further declare that the trustees shall have absolute power to give to any charitable purpose any sum of money as they may think fit.

8. I further hereby declare that my Trustees shall on the youngest of my following children namely:—

(a) Ong Cheow Beng; (b). Ong Kuai Ee; (c) Ong Joo Ee; (d) Ong Soo Ee; (e) Ong Thian Ee; (f) Ong Chu Ee; (g) Ong Teck Ee; (h) Ong Kim Hong; (i) Ong Kim Lan (*f*); (j) Ong Kim Chian (*f*); (k) Ong Kim Cheok (*f*); (l) Ong Kim Mooi (*f*) attaining the age of twenty-one years divide my residuary estate into so many equal shares as may be required and finally distribute them among my said wife and my said children in manner following:

(i) three shares to my wife. PROVIDED that in case my said wife shall die before the date of final distribution of my residuary estate her said shares shall go to my said children in equal shares in the same manner as given below.

(ii) one share to each of my said children as shall survive the date of the final distribution of my residuary estate. PROVIDED NEVERTHELESS that in case any one of my said sons or daughters shall die before the date of such distribution leaving a lawful spouse and/or issue which expression shall include adopted children living at the date of such distribution such spouse and/or such issue shall stand in the place of such deceased son or daughter and take equally between them if more than one the share of my estate which such deceased son or daughter would have taken if he or she had survived the date of such distribution.

The first question for determination was whether according to the true construction of the Will of the Testator the directions given under clause 5 thereof that "the trustees shall have absolute power to give for any charitable purpose any sum of money as they may think fit" is valid. Notice was given by the plaintiffs in this case to the Attorney-General of their instructions to file an Originating Summons, and the Attorney-General appears to have taken the view that clause 5 above does not establish a charity but fails for uncertainty. He did not, therefore, feel that he had any enforceable right or interest but consented to institution of the proceedings in so far as that consent was necessary. This point was not argued at any length. It is clear that no specific charity is named nor any ascertained sum of money or other bequest bequeathed. There can be no doubt that this clause does not create any charitable trust although it doubtless saves the trustees from being called to account should any sum be so expended.

The next question which was put was "whether according to the true construction of the Will of the Testator the intermediate income forms part of the residuary estate or whether there is intestacy in respect thereof." This question, as well as the consequences of the former question on any order which should be made, seem to me to depend on the third question asked, which refers really to the gist of the Will and to which all the argument before me related. This question is "whether upon the proper construction of the Will and in the events that have happened, the residuary estate under clause 8 of the Will is vested in any of the persons specified therein, and, if so, in whom." All the children of the Testator named in clause 8 above were living at the death of the Testator. Ong Joo Ee, the third son, died on the 12th September, 1942, leaving a widow and 5 children. No grant of letters of administration was taken out in respect of his estate. The youngest child, Ong Kim Mooi, will come of age on the 29th February, 1950. Nothing has yet been paid to any of these children under the Will.

Mr. Das argued that there is, under this clause, a gift to defined individuals all of whom were living at the date of death. Reference in the clause to the time of distribution simply fixes the date of payment and no more. Consequently, he says, each of the children and the widow took a vested interest in the share of the estate bequeathed to him or her. The intention of the Testator was to give to each a vested interest subject to a defeasance if the legatee died before the distribution with gift over in such case to the spouse and children of such legatee, if any. This being so, the income which is not specifically disposed of would follow the vested interest and be payable to the legatees entitled. The clause is meant to guard against intestacy, and to construe the interest given as a contingent interest increases the probability of intestacy. On the other hand, to construe the interest as a vested one would avoid intestacy both of corpus and income and would explain the absence of any directions as to the general intermediate income. He argued that the case was similar to, if not the same, as illustration (vi) to section 64 of the Wills Enactment.

He cited a number of cases including *In re Lodwig*[1] where there was, as here, a gift of shares of a residuary estate which was to be paid at the end of 30 years, *In re Gan Eng Seng*[2] and *Wharton v. Masterman*[3].

The trustees did not oppose the argument, their personal interests being the same, nor did they argue to support their action in having made no payment to any of the beneficiaries. It was argued on their behalf that clause 4 implies that the trustees should accumulate the income. Mr. S. O. Chin, for the second defendants, addressed himself closely to the wording of the Will. He relied on the leading case of *Festing v. Allen*[4] and said that the words of gift are to be found in the sub-sections of clause 8 that the gift was not to named individuals as contended by the plaintiffs, nor yet to the children of the Testator, but to "each of my said children as shall survive the date of the distribution of my residuary estates."

The plaintiffs' argument consisted largely of citations of law as to the consequences following immediately and more remotely on the construction given to the words of the Will. As Mr. Chin argued the intention of the Testator, as expressed in the Will, is the primary consideration. The words used should not be read in the light of legal rules, but their meaning should first be ascertained and then the law applied. It is easy to think that one could have drawn a better Will than the Testator, or a better one in the light of later circumstances, or one more agreeable to legal rules. This is to be avoided. As Jessel M.R. said in *Cunliffe v. Brancker*[5] :—

> How far Judges may be or ought to be able to defeat a rule of law of which they disapprove, I cannot say. I think it is the duty of a Judge not to allow himself to be so influenced, but to construe the instrument in a proper way, to arrive at its meaning independently of the results and then apply the law. This has been laid down over and over again with regard to another rule of law — the rule against remoteness or perpetuity — but I do not see that because in the opinion of the Judge the one rule of law is reasonable and the other unreasonable, the rules of construction are to be altered.

The point in dispute between the parties is whether the words of gift create a vested or a contingent interest. Under the Will there is a gift to the Trustees in the first place, and the Will contemplates the creation of a trust fund in their hands. The ultimate destination of that fund and the beneficial interest in it is dealt with in clause 8. That clause contains almost at the beginning a list of the Testator's children, but this is not given as a list of donees. It is given as a list of whom the youngest is to be selected; she is selected in order that the date of her majority, if she live so long, shall be the date of distribution of the estate. The earlier part of this clause is concerned with fixing the date of the division and distribution. The words of gift follow, and what is given is one or three of an unascertained number of shares, and of a number which cannot be surely ascertained before that date as even if married the child, spouse and children may die. The words of gift to the wife and to the children differ. The latter deals with the bulk and I shall, in any case, take it first. The material words are "one share to each of my said children as shall survive the date of the final distribution of my residuary estate." As I understand the rule established by the cases, the distinction between words creating a contingent interest, and words which give rise to a vested interest payable or coming into possession later, turns on whether the words fixing the time of payment should be read as words descriptive of the donees or in some other way importing a contingency or as purely temporal; whether they define an attribute of the person or interest, or whether they merely fix the date of full enjoyment. Quite clearly here the gift is not to all the children, so clearly listed before, but to each of them as shall survive the date of final distribution, that is, at present, the 20th February, 1950. The position at that date determines the number and identity of the donees, and likewise the number of shares. On the cases cited the point seems perfectly clear and seemed so to me on the argument, though I thought it wiser to postpone judgment to see if further consideration might incline to another view. The illustration to section 64 of the Wills Enactment 1938 cited by plaintiffs, like most illustrations provided by legislators is of a perfectly simple and obvious kind. It is of little value in considering the infinite variety of forms of words met with in actual life. There is a gift to 3 persons undefined and unrestricted, and the time named is specified as a time of payment and no more. The case of *In re Lodwig*[1] cited by plaintiffs might itself be relied on in deciding this case against them. In that case the date fixed was the day on which the youngest of the children of the Testator's daughter-in-law by his son attain the age of thirty years. This date was fixed for the purpose of limiting the period for which weekly payments were to be made to the daughter-in-law and grandchildren. It is then used again, and one might say necessarily so used, as the date of division of the capital, the words of gift being "shall be divided between my said daughter-in-law Katie Lodwig and her children in equal shares as tenants in common." The date in no way enters into the description of the person or thing. The judgment of Sargant J. is really more illuminating than those of the Court of Appeal affirming him on which plaintiffs rely. He distinguishes these dispositions from those in three cases relied on by those arguing for a contingency. These were *Leeming v. Sherratt*[6], *Parker v. Sowerby*[7]

and *Lloyd v. Lloyd*[8]. In the first there was a bequest of residue of which there were no clear words of gift but a trust to sell and "to pay and divide the money arising therefrom, as soon as my youngest child shall attain the age of twenty-one unto and equally amongst any children share and share alike" with gifts over. The point was whether the gift being found in the direction to divide it was contemporaneous with the division Wigram. V.C. said :—

> The rule of construction . . . . . is simply this: Courts of Equity, in the construction of wills relating to personal estate follow the rules of the civil law. By that law, when a legacy is given absolutely and the payment is postponed to a future definite period, the Court considers the time as annexed to the payment and not to the gift of the legacy and treats the legacy as *'debitum in praesenti solvendum in futuro'*.

The rule so stated and using the word 'absolutely', to some extent, begs the question, as the point to be determined is whether a condition is introduced to render the gift not absolute, but the substance of it is that the temporal condition will be attached to the payment unless there be reason to make the gift also subject to that condition. The Court also held that only those attaining 21 years took the vested interest. *Parker v. Sowerby*[7] is closely similar, but in *Lloyd v. Lloyd*[8] there was a devise on trust after all the Testator's grandchildren had attained the age of 21 years to sell, and the gift was in the direction to pay the proceeds "to and amongst all and every such child or children, share and share alike if more than one, and if but one, then the whole thereof to such only child, for his, her or their respective use and benefit, and as his, or their own proper moneys absolutely." Meanwhile, the rents and profits were to go to the Testator's daughter and after her death the Trustees were to apply the same to the maintenance etc. of all and every her child or children until the time before referred to. "Such child or children" refers to these. Distribution was ordered to those who shall be receiving the rents and profits when the youngest child attains twenty-one. Here the time fixed might have appeared to be primarily for the purposes of the Will. Much weight was applied to the word "such" as limiting children to those enjoying the rents. In all the interest vested on the child attaining twenty-one.

Discussing these cases in *In re Lodwig*[1], Sargant J. said at page 29 :—

> It is curious that no one of these cases (all of which relate to a distribution on the youngest member of a class attaining twenty-one years) amounts to an actual decision in favour of introducing the contingency. In **Leeming v. Sherratt**[6] the decision was only that those attaining the age of twenty-one took vested interests thereupon and were not excluded by death subsequently and before the period of distribution; and this was again the case in **Parker v. Sowerby**,[7] since it is clear from the report that both of the children who were dead had attained the age of twenty-one years. Further, in **Lloyd v. Lloyd**[8] the gift was to such child or children, so that the contingency was expressly introduced by the word 'such',

and a little later at page 30 :—

> On the whole it may well be that in the case of gifts by way of division amongst children on the youngest attaining twenty-one, substantially similar to those in **Leeming v. Sherratt**,[6] **Parker v. Sowerby**[7] and **Coldicott v. Best**[9] the Court would be bound to introduce into the qualification or definition of the class to take the contingency of attaining twenty-one. But I cannot take those decisions as laying down any general principle of construction applicable to gifts to classes at any age, however late; and in any case the presumption is slight and may very easily be rebutted. Under the present will the distribution is not to take place until the youngest child has attained as late an age as thirty, and the words of actual denotation of the takers, which are elaborate and precise, include Katie Lodwig herself, and are separated by a considerable interval from the words defining the period of distribution.

"Such" in *Lloyd v. Lloyd*[8] does not link the description of the donees as closely to the time as do the words "each.....as" in this Will. Here the time of distribution is not separated from the "words of actual denotation of the takers" but is immediately connected with them, and referred to in them. Here the age is 21 as in the cases which Sargant J. is distinguishing.

That part of the judgment of the Master of the Rolls on which Mr. Das relied at the foot of page 32 does not help him. The principal point decided in this case was that the contingency implied that the donee should attain 21 years where the time of payment is the youngest attaining that age (the case here) would not be extended to cases where the age given is 30 years, so that the disposition would be avoided by the rule as to remoteness. The Master of the Rolls went on to rely on the wording of the gift over, but that argument would apply against the plaintiffs here since the gift is not of the share *vested* in the deceased parent, but the share he *would have taken* had he survived the date.

This case seems to me to be decided by the leading case of *Festing v. Allen*[4]. It is true that that is a devise of realty, but the words of gift closely resemble those in this Will, and read "to the use of all and every the child or children of her the said M.H.J. who shall attain the age of twenty-one years, if more than one, equally to be divided amongst them, share and share alike, to hold as tenants in common etc. for ever, and if but one such child, then to the use of such child etc. for ever." In a joint judgment the Barons of the Exchequer held this a contingent remainder which in the event failed, remarking that "The gift is not to the children of Mrs. Festing but to the children who shall attain 21, and no one who has not attained his age of 21 years is an object

of the testator's bounty, any more than a person who is not a child of Mrs. Festing." These words might be applied exactly to the words of gift in this will.

Festing v. Allen[4] has been repeatedly followed. In *In re Astor*[10] the devise was "in trust in fee simple or absolutely for such son (living at my death) of my son Waldorf Astor as first or alone attains the age of 21 years....." This language closely resembles that of the Will before the Court. Russell J. in giving judgment, after considering *Festing v. Allen*[4] said :—

> In the case of Lord Astor's will there is no gift to anyone who does not answer the whole of the description. The devisee cannot be ascertained until one of the four grandsons of the testator attains the age of 21 years.

Later at page 504 he went on :—

> A devise of real estate to a devisee *when* he shall attain a certain age, or *if* he shall attain a certain age, without any further context to assist, is contingent, and the attainment of the prescribed age is a condition precedent to the estate vesting in him — **In re Francis**[11]. A sufficient context may be found which enables the Court to declare the estate to be a vested estate, defeasible on death under the prescribed age; as for instance, there may be in terms a disposition of the intermediate income, or there may be a gift over in the event of the devisee failing to attain the necessary age, or some other sufficient context. In the case before me there is such a gift over, and the provisions exist in the will which would enable me to construe this devise as conferring a vested estate defeasible, if there were any persons in whom the estate could be said to be vested.

I do not think the shares in this Will vest until the youngest child attains 21 years. The words of gift are to determine the matter when clear. I think that they are here, and that they cannot be varied by mere inferences from the context.

Mr. Das argued that the gift over in Ong's Will suggested that the interest vested. As has been already pointed out, the actual wording of the gift is more consistent with the opposite view. There is here no specific gift of the intermediate income; the existence of a supporting estate or interest does not arise. The plaintiff and trustees are interested in the intermediate income and the argument was at times circular, and to the effect that because they were entitled, or should be, to the income, therefore the interest was vested. Mr. Ong stated definitely that although clause 4 might be read as a direction to accumulate this was to be disregarded and also the express terms of that clause. Mr. Das also could give no meaning to clause 4 consistent with his argument, and said it must be ignored. Such argument would seem to amount to saying that the words of gift, which were not analysed with care, must be read subject to the context where the context supports their construction, but that context must be disregarded where it is inconsistent. The Testator does not seem to have been unmindful of the income as clause 2 shows, and I should be very slow to say there was an intestacy as to that. In clause 4 the word used is "allowance". If the Testator regarded clause 2 as giving the executors the estate, the investments and proceeds would be in their name, and the income of the unconverted property, though in the Testator's name, was also to go to the executors. In such case the use of the word "allowance" as a payment of a sum fixed by, and at the permission of, the executors is appropriate, and the clause amounts to a direction to pay no part of the income to the wife and children.

The authorities cited show the correct method of approach. The words of gift are the primary consideration, and here, they seem to me, clear. There is neither ambiguity nor "sufficient context" to vary the sense but rather the context supports the sense attached to the gift. Mere silence as to the intermediate income is not sufficient context. The consequence of that silence I shall revert to presently, but I should here refer to a case cited by plaintiffs, *In re Turney*[12] as the language of the gift in that case is, at first sight, close to this. The choice in that case was not merely, as here, between a vested interest and a contingent one, but between the former and the provision being void by offending against the rule against perpetuities. Lord Lindley said at page 744 :—

> The supposed intestacy is not created by any ambiguity in the language of the will; it arises from the application to the will of the rule against perpetuities. Of course, we are not at liberty to misconstrue the will in order to avoid an intestacy resulting from the application of that rule, any more than in cases in which gifts are bad under the Charitable Uses Act. We must construe the will and ascertain its meaning, and the question we have to consider is whether these gifts were vested, subject to being divested, or were vested only on the attainment of twenty-five years.

And Sir F. H. Jeune at page 747 referred to this as follows :—

> Of course, as the Master of the Rolls has said, the Court has no right to misconstrue a will with that object, but if the language of a will is ambiguous, it is right to lean rather to a construction which will undoubtedly carry out the intention of the testator, in the sense that it will make his will effectual and not render it void by means of a doctrine from which, if he had known of it, he would certainly have desired to steer clear.

The gift was "and after his (J.N's) death upon trust for his child or children *absolutely* upon their attaining twenty-five years. And in the event of the death of either or all the children of his son J.N. before attaining the age of twenty-five years, then upon trust to pay the share of the child or children so dying to his son H.G. absolutely." Lord Lindley construing this said :—

> Now, what does the testator mean by 'absolutely'? Does he mean more than this — that the shares are to be paid to the son's children at twenty-five? The language is ambiguous, but the word is used for some purpose — to make something clearer than it would be without it — and my impression is that it refers rather to payment than to vesting. I do not say the wording is clear; it is

not. But what to my mind removes the difficulty of holding these to be vested interests is this — that the testator treats the children of his son as having "shares" although they may die before attaining twenty-five. The words are: "in the event of the death of either or all the children of my son James Neave before attaining twenty-five, then upon trust to pay the share of the child or children so dying to my son Horace." He treats the children of James who may die under twenty-five as having "shares", which he bequeaths . . . . . Obscure as the language is, I think the preferable meaning, and that which is most in accordance with the testator's wish, is that a vested interest in the moiety is given to the children of James Neave to be paid to them at twenty-five, with a proviso that if they die under twenty-five their interest is to be divested. I think that is the preferable view; and if that is the right construction, the question of remoteness does not arise. Apart from any question of remoteness, I should say that is the true meaning. I do not see how otherwise full effect can be given to the words 'upon trust to pay the share of the child or children so dying.' . . . . .

I turn now to the two sums of £12,000 given to the testator's daughters, their husbands and children. The trust of the first £12,000 is 'for all the children of my said daughter when they shall attain the age of twenty-five years, but not before' (I do not think anything turns upon 'not before' — it only emphasises it), 'whether a son or daughter, and if more than one in equal shares'. Who are the legatees? Are the legatees all the children of the daughter, or are they the children of the daughter who shall live to attain twenty-five? The word 'when' is not equivalent to 'who'. The gift is to the children of the daughter, and 'when' indicates the time.

Romer L.J. at page 748 said:—

I agree that there is no intestacy in this case, and I base my opinion upon the very peculiar wording of the will and codicil. With regard to the residue, in my opinion the gift in the codicil after the death of James Neave, 'upon trust for his child or children absolutely upon their attaining the age of twenty-five years', is clearly a gift to a class, and there could have been only two classes — one composed of those children who attained twenty-five, and the other including also those who did not attain that age. The gift is coupled with a provision that they were not to enter into actual indefeasible possession of their shares unless they attained twenty-five years. The expression is ambiguous. I agree that, if it stood by itself, the true construction would be that the class would include only the children who attained twenty-five. But the succeeding clause proves to my mind conclusively that the testator could not have intended that the class should be made up only of those children who attained twenty-five, for he provides that, in the event of any child dying before attaining the age of twenty-five, that child's 'share' should go over — not to the other members of the class, but to a stranger. He treats the child as in possession of a share notwithstanding that he never attained twenty-five, and could not, therefore, have been a member of the class who attained that age.

If I understood Mr. Das aright he based on this case an argument that a direction to divide into as many equal shares as may be required and distribute does not postpone vesting. It is, however, the vesting that determines the number of shares required, and the point does not assist in fixing the time of vesting. The case is, in my opinion, against him, and is in accordance with the law set out. All Lord Justices agreed the words of gift were ambiguous, though Romer L.J. would have decided against a vested interest on the gift alone. They relied on the word "absolutely", not in Ong's will, on the use of "when" as against "who", whereas here the language is equivalent to "who", and lastly on the gift over to a stranger, which is not to be found here. The case has, therefore, no close bearing on this.

There is a silence as to the income of the trust fund though the provision that the income of the unsold part of the estate should be applied as if it were income of investment seems to imply the Testator thought the position as to the latter was clear. I think it is. It is the income of a trust fund, and the rules applicable thereto are to be found in Lord Davey's speech in *Wharton v. Masterman*[3] where he says:—

It is said that the will contains no direction to invest the income of the investments of the surplus income. There is no express direction, but, in my opinion, there is an implied direction, to be found as well in the use of the word "accumulations", which, in this connection, imports a continuous process of rolling up, as in the general rule of equity, which imposes upon trustees the duty of investing trust funds in their hands of which the testator has not directed an immediate disposition. And I think that the accumulations comprise the whole fund created by the investment and re-investment by way of compound interest of the surplus income and the income derived from it. It is, however suggested at the Bar that the income of investments of surplus income falls back into the original trust fund and follows the destination of the income of it and is therefore subject to a trust for the annuitants. In my opinion, this is not so. When there is no express trust declared of the income of a trust fund, it follows the destination of, and is an accretion to, the fund from which it is derived (unless there be words excluding that implication).

But here there is in addition the implication to be found in clause 4; I think the children's interests are contingent.

The gift to the widow stands on a different footing. The wording is quite different. It is to distribute "three shares to my wife." There is a gift over of those same shares as if they vested, and no reference to shares she "would have taken" as in the gift over from the children. It is true that payment must be postponed. It might be argued that the time here must be taken to apply to the vesting of the gift rather than to the payment because it does so in the case of the children. It is also true that the final diviser of the shares is not known until the date of distribution. It might be suggested that here is a contingency arising from the nature of the property given, as there is often said to be in the description of the donee. There does not seem any authority on the point, and while it might be so, I must be satisfied it is so here. The shares actually spoken of will only come into existence in the future, but they are shares of existing property and accumulations thereon. The widow's shares can increase only by reason of the death of children unmarried, or widowed and childless. They are, till distribution, undivided shares, and until then have only a notional existence. The fact that they may be increased by later events seems no reason against the vesting of the part which is certain. The words of

gift may again be regarded as determinant and overriding any mere presumptions from the context. The only reason for not giving the words their full meaning would seem to be some impossibility or injustice in giving effect to them. I see none here. The widow by the gift takes a vested interest in 3/15 subject to the gift over.

The next question is whether this vested interest would carry with it the income of that share. There is a presumption that it would, but here we have the express provision of clause 4 to the contrary. That clause speaks of beneficiary and not child, but the word may have been chosen to include widow. It certainly does. There is no evidence as to whether the reason given applies to her. On the other hand, though the clause is merely prohibitory, it has been held to imply an accumulation, and I cannot discover that it can have any other practical result. Similarly, a positive direction to accumulate implies a prohibition to pay out. The accumulation of 1/5 share of the income must be for the benefit of the widow, and were an addition to that share necessary a proportional accumulation could be debited to her for the purpose of distribution. There is, however, the gift over. The widow's claim for income despite the accumulation would be based on the principle on which *Wharton v. Masterman*[3] was decided. The principle was defined by Lord Davey at page 198 :—

> That where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime, and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit.

In that case the charities took the full ownership subject to the accumulation and there was no later interest. The same great authority last cited goes on :—

> There is no condition precedent to happen or to be performed in order to perfect the title of the legatees, and there is no other person who has any interest in the execution of the trust for accumulation, or who can complain of its non-execution . . . . . It may be observed, however, that the Court of Chancery always leant against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest.

The insistence on the interest being not only vested but absolute is clear and is the basis of the rule. This interest is subject to defeasance. Should the widow die before 20th February, 1950, it passes to the children whether or not she has other next of kin or marries again. After that date it is hers absolutely. There are, therefore, others interested who are entitled to the shares plus actual accumulation and not plus a notional sum brought into hotch potch for distribution. It is, therefore, impossible to treat her as entitled to the intermediate income and at the same time be in a position to carry out the terms of the Will. Even though her interests be vested, she is not, under the terms of the Will, entitled to the income on her shares.

The answers to the second and third questions are, therefore, that there is no intestacy as to the intermediate income, nor is it strictly residuary estate but is subject to accumulation in the hands of the trustees; that 3 shares in the trust fund are vested in the widow but that the shares of the children are contingent upon their surviving the youngest child's minority; that the widow is not entitled to immediate payment. The next sub-question is obscure and is stated as a condition which is not a necessary alternative and which does not occur. It was explained in Court as an application as to whether the trustees had power under section 33 of the Trustee Enactment, Cap. 61, to pay an allowance as maintenance. This section corresponds to section 31 of the Trustee Act, 1925. Mr. Chin contended that they had no power and there could be no claim to maintenance in the face of the terms of clause 4. Mr. Das argued an accumulation does not indicate an intention of the Testator against the payment of maintenance. I should have thought it did; moreover here the accumulation is not express but deduced from a direction to pay no allowances. That is much stronger. There is, however, no doubt that the accumulation takes from the contingent interest of the minor the intermediate income. The point was considered in *In re Reade-Revell, Crellin v. Melling*[13]. That case clearly covers this point, and is a strong case as the testator's provision for the infant in that case had partially failed. The answer to this point is, therefore, also in the negative, and there should be a declaration that the trustees have no power to apply the income to the infant's maintenance.

Order accordingly.